



CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 21-C0001]

Cybox International, Inc., Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements that it provisionally accepts under the Consumer Product Safety Act in the Federal Register in accordance with the terms of the Consumer Product Safety Commission's regulations. Published below is a provisionally-accepted Settlement Agreement with Cybox International, Inc., containing a civil penalty in the amount of seven million, nine hundred and fifty thousand dollars (\$7,950,000), subject to the terms and conditions of the Settlement Agreement.¹

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Division of the Secretariat by **[INSERT DATE 15 CALENDAR DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to Comment 21-C0001, Division of the Secretariat, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504-7479; email: cpsc-os@cpsc.gov.

FOR FURTHER INFORMATION CONTACT: Leah Wade Ippolito, Supervisory

¹ The Commission voted 3-0-1 to provisionally accept the proposed Settlement Agreement and Order regarding Cybox International, Inc. Acting Chairman Adler, Commissioners Kaye and Baiocco voted to provisionally accept the Settlement Agreement and Order. Commissioner Feldman did not vote on this matter.

Attorney, Division of Enforcement and Litigation, Office of Compliance and Field Operations, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814-4408; lippolito@cpsc.gov. **SUPPLEMENTARY INFORMATION:** The text of the Agreement and Order appears below.

Dated: February 11, 2021.

Alberta E. Mills,

Secretary.

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the Matter of:

CYBEX INTERNATIONAL, INC.

CPSC Docket No.: 21-C0001

SETTLEMENT AGREEMENT

1. In accordance with the Consumer Product Safety Act, 15 U.S.C. §§ 2051–2089 (“CPSA”) and 16 C.F.R. § 1118.20, Cybex International, Inc. (“Cybex”), and the United States Consumer Product Safety Commission (“Commission”), through its staff, hereby enter into this Settlement Agreement (“Agreement”). The Agreement and the incorporated attached Order resolve staff’s charges set forth below.

THE PARTIES

2. The Commission is an independent federal regulatory agency, established pursuant to, and responsible for, the enforcement of the CPSA, 15 U.S.C. §§ 2051–2089. By executing the Agreement, staff is acting on behalf of the Commission, pursuant to 16 C.F.R. § 1118.20(b). The Commission issues the Order under the provisions of the CPSA.

3. Cybex is a corporation, organized and existing under the laws of the state of New York, with its principal place of business in Rosemont, Illinois.

STAFF CHARGES

4. Between 1996 and 2008, Cybex manufactured, distributed and offered for sale in the United States approximately 4,800 Model VR2, VR2TA, Eagle, and VR3 Arm Curl Machines (“Arm Curl”).

5. Between 1989 and 2009, Cybex manufactured, distributed and offered for sale in the United States approximately 15,000 Model 5340 and 5341 Smith Press Machines (“Smith Press.”)

6. The Arm Curl and Smith Press Machines (collectively, the “Subject Products”) are “consumer products” that were “distribut[ed] in commerce,” as those terms are defined or used in sections 3(a)(5) and (8) of the CPSA, 15 U.S.C. § 2052(a)(5) and (8). Cybex is a “manufacturer” and “distributor” of the Subject Products, as such terms are defined in sections 3(a)(7) and (11) of the CPSA, 15 U.S.C. § 2052(a)(7) and (11).

Violation of CPSA Section 19(a)(4)

Arm Curl Machines

7. The Arm Curl Machines contain a defect which could create a substantial product hazard and create an unreasonable risk of serious injury or death because the weld that connects the swivel handle to the arm of the machine can fatigue and fail, causing the handle to separate unexpectedly from the frame of the machine. This separated handle can strike the user in the face.

8. Between mid-2002 (when Cybex was able to retrieve incident information) and June 2015, Cybex received 85 reports of broken handles, including incidents that resulted in lacerations requiring stitches and one grievous bodily injury involving a consumer who permanently lost vision in one eye when the handle separated during use and struck the consumer in the face.

9. Despite information that reasonably supported the conclusion that the Arm Curl Machine contained a defect that could create a substantial product hazard or created an unreasonable risk of serious injury or death, Cybex did not immediately report to CPSC.

10. In June 2015, Cybex filed a Full Report with the Commission under 15 U.S.C. § 2064(b) concerning the Arm Curl Machines.

11. Cybex and the Commission jointly announced a Fast Track recall of the Arm Curl Machines on August 25, 2015. The press release announcing the recall noted that the swivel handles can break off from the frame causing users to hit themselves in the face or head, posing an impact injury hazard.

Smith Press Machines

12. The Smith Press Machines contain a defect which could create a substantial product hazard and create an unreasonable risk of serious injury or death because the weight bar can fall, posing serious impact injury hazards to the user.

13. Between late 1991 and January 2018, Cybex received 27 reports of injuries associated with the Smith Press Machine, including grievous bodily injuries such as paralysis and spinal fracture.

14. Despite information that reasonably supported the conclusion that the Smith Press Machines contained a defect that could create a substantial product hazard or created an unreasonable risk of serious injury or death, Cybex did not immediately report to CPSC.

15. In January 2018, Cybex filed a Full Report with the Commission under 15 U.S.C. § 2064(b) concerning the Smith Press Machines.

16. Cybex and the Commission jointly announced a Fast Track recall of Smith Press Machines on August 29, 2018. The press release announcing the recall noted that the weight bar can fall, posing serious injury hazards to the user.

Failure to Timely Report

17. Despite having information reasonably supporting the conclusion that the Subject Products contained a defect or created an unreasonable risk of serious injury or death, Cybex did not notify the Commission immediately of such defect or risk, as required by sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. § 2064(b)(3) and (4), in violation of section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4).

18. Because the information in Cybex's possession about the Subject Products constituted actual and presumed knowledge, Cybex knowingly violated section 19(a)(4) of the

CPSA, 15 U.S.C. § 2068(a)(4), as the term “knowingly” is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d).

19. Pursuant to section 20 of the CPSA, 15 U.S.C. § 2069, Cybex is subject to civil penalties for its knowing violation of section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4).

RESPONSE OF CYBEX

20. This Agreement does not constitute an admission by Cybex to the staff’s charges set forth in paragraphs 4 through 19 above, and Cybex specifically refutes the staff’s findings that Cybex did not timely file section 15(b) reports on the Subject Products.

21. The Arm Curl and Smith Press have not been sold since 2008 and 2009 respectively. The Subject Products were designed, manufactured and sold by prior ownership of the Cybex business (which was sold in 2016 and again in 2019). The original owners of Cybex recalled and retrofitted the Arm Curl in 2015 and the CPSC’s investigation was underway when the Company was sold in 2016. After assessing the legacy business and engaging in discussions with CPSC, the new owner of Cybex determined that it was required to submit a report to the CPSC regarding the Smith Press in connection with the CPSC’s ongoing investigation.

22. Due to the complexity of consumer interaction with and use of exercise equipment, and the critical role of fitness center owners in monitoring users and maintaining the equipment, consumer reports can be difficult for a manufacturer to obtain and evaluate, may not be received promptly, and may not include complete and accurate information.

23. With regard to the Smith Press, there is a risk of users failing to fully seat a weighted bar across the pins when racking the bar, thereby causing the bar to fall. Further, the equipment had extensive product safety and usage labeling and a safety stop that users frequently failed to activate while exercising. Racking systems similar to the Smith Press racking system were widely used throughout the industry during the time the Smith Press was sold and in use. Cybex believes that the number of reports of injuries associated with the weight bars was infinitesimally small in view of the millions of uses of this equipment.

24. With regard to the Arm Curl, over time the arm of certain of the machines experienced weld fatigue, despite the equipment passing rigorous and extensive product load and endurance testing. Cybex believes that the number and extent of injuries were limited.

25. At all relevant times, Cybex had a product safety compliance program, including quality control personnel and a product safety testing program. Following the sale of Cybex in 2016, new ownership implemented improvements to that compliance program to further ensure that it is consistent with industry standards.

26. Cybex enters into this Agreement solely to settle this matter without the delay and expense of litigation. Cybex does not admit to any fault, liability, violation of any law, or wrongdoing with respect to the Arm Curl or Smith Press machines, and Cybex's willingness to enter into this Agreement and Order does not constitute, nor is it evidence of, an admission by it of any fault, liability, violation of any law, or any wrongdoing.

AGREEMENT OF THE PARTIES

27. Under the CPSA, the Commission has jurisdiction over the matter involving the Subject Products and over Cybex.

28. The parties enter into the Agreement for settlement purposes only. The Agreement does not constitute an admission by Cybex or a determination by the Commission that Cybex violated the CPSA's reporting requirements.

29. In settlement of staff's charges, and to avoid the cost, distraction, delay, uncertainty, and inconvenience of protracted litigation or other proceedings, Cybex shall pay a civil penalty in the amount of seven million, nine hundred and fifty thousand dollars (\$7,950,000) within thirty (30) calendar days after receiving service of the Commission's final Order accepting the Agreement. All payments to be made under the Agreement shall constitute debts owing to the United States and shall be made by electronic wire transfer to the United States via <http://www.pay.gov>, for allocation to, and credit against, the payment obligations of

Cybex under this Agreement. Failure to make such payment by the date specified in the Commission's final Order shall constitute Default.

30. All unpaid amounts, if any, due and owing under the Agreement, shall constitute a debt due and immediately owing by Cybex to the United States, and interest shall accrue and be paid by Cybex at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b) from the date of Default, until all amounts due have been paid in full (hereinafter "Default Payment Amount" and "Default Interest Balance"). Cybex shall consent to a Consent Judgment in the amount of the Default Payment Amount and Default Interest Balance, and the United States, at its sole option, may collect the entire Default Payment Amount and Default Interest Balance, or exercise any other rights granted by law or in equity, including, but not limited to, referring such matters for private collection, and Cybex agrees not to contest, and hereby waives and discharges any defenses to, any collection action undertaken by the United States, or its agents or contractors, pursuant to this paragraph. Cybex shall pay the United States all reasonable costs of collection and enforcement under this paragraph, respectively, including reasonable attorney's fees and expenses.

31. After staff receives this Agreement executed on behalf of Cybex, staff shall promptly submit the Agreement to the Commission for provisional acceptance. Promptly following provisional acceptance of the Agreement by the Commission, the Agreement shall be placed on the public record and published in the *Federal Register*, in accordance with the procedures set forth in 16 C.F.R. § 1118.20(e). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the Agreement shall be deemed finally accepted on the 16th calendar day after the date the Agreement is published in the *Federal Register*, in accordance with 16 C.F.R. § 1118.20(f).

32. This Agreement is conditioned upon, and subject to, the Commission's final acceptance, as set forth above, and it is subject to the provisions of 16 C.F.R. § 1118.20(h). Upon the later of: (i) Commission's final acceptance of this Agreement and service of the

accepted Agreement upon Cybex, and (ii) the date of issuance of the final Order, this Agreement shall be in full force and effect, and shall be binding upon the parties.

33. Effective upon the later of: (i) the Commission's final acceptance of the Agreement and service of the accepted Agreement upon Cybex and (ii) the date of issuance of the final Order, for good and valuable consideration, Cybex hereby expressly and irrevocably waives and agrees not to assert any past, present, or future rights to the following, in connection with the matter described in this Agreement: (i) an administrative or judicial hearing; (ii) judicial review or other challenge or contest of the Commission's actions; (iii) a determination by the Commission of whether Cybex failed to comply with the CPSA and the underlying regulations; (iv) a statement of findings of fact and conclusions of law; and (v) any claims under the Equal Access to Justice Act.

34. Cybex shall maintain a compliance program designed to ensure compliance with the CPSA with respect to any consumer product imported, manufactured, distributed or sold by Cybex, and which shall contain the following elements:

- (i) written standards, policies and procedures, including those designed to ensure that information that may relate to or impact CPSA compliance is conveyed effectively to personnel responsible for CPSA compliance, whether or not an injury is referenced;
- (ii) a mechanism for confidential employee reporting of compliance-related questions or concerns to either a compliance officer or to another senior manager with authority to act as necessary;
- (iii) effective communication of company compliance-related policies and procedures regarding the CPSA to all applicable employees through training programs or otherwise;
- (iv) Cybex's senior management responsibility for, and Cybex's general board oversight, consistent with its policies and procedures of, CPSA compliance; and
- (v) retention of all CPSA compliance-related records for at least five (5) years, and availability of such records to CPSC staff upon request.

35. Cybex shall maintain and enforce a system of internal controls and procedures designed to ensure that, with respect to all consumer products imported, manufactured, distributed or sold by Cybex:

- (i) information required to be disclosed by Cybex to the Commission is recorded, processed and reported in accordance with applicable law;
- (ii) all reporting made to the Commission is timely, truthful, complete, accurate and in accordance with applicable law; and
- (iii) prompt disclosure is made to Cybex's management of any significant deficiencies or material weaknesses in the design or operation of such internal controls that are reasonably likely to affect adversely, in any material respect, Cybex's ability to record, process and report to the Commission in accordance with applicable law.

36. Upon request of staff, Cybex shall provide written documentation of its internal controls and procedures, including, but not limited to, the effective dates of the procedures and improvements thereto. Cybex shall cooperate fully and truthfully with staff and shall make available all non-privileged information and materials, and personnel deemed necessary by staff to evaluate Cybex's compliance with the terms of the Agreement.

37. The parties acknowledge and agree that the Commission may publicize the terms of the Agreement and the Order.

38. Cybex represents that the Agreement: (i) is entered into freely and voluntarily, without any degree of duress or compulsion whatsoever; (ii) has been duly authorized; and (iii) constitutes the valid and binding obligation of Cybex, enforceable against Cybex in accordance with its terms. The individuals signing the Agreement on behalf of Cybex represent and warrant that they are duly authorized by Cybex to execute the Agreement.

39. The signatories represent that they are authorized to execute this Agreement.

40. The Agreement is governed by the laws of the United States.

41. The Agreement and the Order shall apply to, and be binding upon, Cybex and

By: /s/
Kathleen M. Sanzo
Counsel to Cybex International, Inc.

U.S. CONSUMER PRODUCT SAFETY
COMMISSION

Dated: 1/25/2021

By: /s/
Leah Wade Ippolito
Supervisory Attorney
Office of Compliance and Field Operations

BY ORDER OF THE COMMISSION:

/s/
Albert Mills, Secretary
U.S. Consumer Product Safety Commission

[FR Doc. 2021-03121 Filed: 2/16/2021 8:45 am; Publication Date: 2/17/2021]